UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION TO DISMISS – LACK OF JURISDICTION-President's Military Order Establishing the Commission Violates Equal Protection Clause of the United States' Constitution**
v.	)	
DAVID M. HICKS	)	
	)	**04 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges on the ground that the military commission lacks jurisdiction because its distinction between citizens and non-citizens denies Mr. Hicks Equal Protection of the laws, and states in support of this motion:

1. **Synopsis:** Under the President's Military Order of 13 November 2001, an Australian citizen such as Mr. Hicks is subject to trial before a military commission. In contrast, United States citizens are by the terms of the PMO *not* eligible for trial before the military commission, and instead must be prosecuted – for the same or similar alleged conduct – in the federal courts, in which the government acknowledges they would be guaranteed extensive judicial and constitutional protections.[1] Further still, citizens of other nations, such as Great Britain, Pakistan, Saudi Arabia, and France (among others), have been, and continue to be, released and repatriated without trial and/or punishment. Such discrimination on the sole basis of citizenship violates the equal protection guarantees of the United States Constitution, and the law of war and human rights law under which the United States is legally bound. Therefore, the President's Military Order of 13 November 2001, establishing this military commission is invalid because it expressly discriminates against non-citizens, and between non-citizens of different countries.

2. **Facts:** United States citizens, such as John Walker Lindh and Yasser Esam Hamdi, have been captured in Afghanistan with Taliban troops and charged with joining and supporting international terrorist organizations hostile to the United States, and with taking up arms against their own country in a conspiracy to kill U.S. nationals and attack U.S. interests and property.

U.S. citizens such as Mr. Lindh have been afforded the full protections of the Constitution and the judicial guarantees of a trial in federal court. Mr. Hamdi, solely by virtue of his U.S. citizenship, was plucked from Guantanamo Bay and spared trial by this

[1] This is not a concession that such protections do not apply to Mr. Hicks in these military commission proceedings, or a waiver of his assertion of such rights. Indeed, it is Mr. Hicks's position that such rights do apply to these proceedings if the commission is be a valid form of adjudication. *See Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2650 (2004); *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004).

military commission system. More recently, after the Supreme Court vindicated Mr. Hamdi's right to Due Process, and to counsel, the government has agreed to repatriate Mr. Hamdi to Saudi Arabia without seeking any judicial or other finding as to his conduct or culpability.

In addition to unwarranted and unreasoned distinctions between U.S. citizens and aliens, the government has discriminated among aliens of different nationalities. For example, the United States Government has during the course of the past 30 months released and repatriated – without trial, punishment, or any sanction or factual finding – many Guantanamo detainees to their own countries, including Great Britain, Pakistan, Saudi Arabia, France, Afghanistan, Sweden, and Denmark.

3. **Discussion:**

A: Introduction

The President's Military Order (the PMO or the Order) of 13 November 2001, establishing this military commission is invalid because the Order expressly discriminates against non-citizens. Under the Order, a non-citizen such as Mr. Hicks, alleged to be an unlawful combatant during the conflict in Afghanistan, is subject to trial before a military commission, a tribunal affording him few, if any, of the protections provided by our Constitution and civilian or military justice systems, as well as by international law. At the same time, U.S. citizens who were allegedly unlawful combatants in Afghanistan are capable of prosecution only in a federal court in which they are afforded the full panoply of Constitutional protections.

Such disparate treatment – based exclusively on citizenship – of persons alleged to have committed the same misconduct violates the equal protection guarantees of both the Fifth Amendment and 42 U.S.C. §1981. In addition, discrimination on the basis of citizenship violates articles common to the four 1949 Geneva Conventions.[2] The International Committee of the Red Cross Commentary on the Geneva Conventions explains that these articles common to the four Geneva Conventions have the effect that "court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up

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[2] *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), art 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), art 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), art 129; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 146. All four conventions were ratified by the United States on 2 August 1955. Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>. The article states "... In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949."

special tribunals to try war criminals of enemy nationality,"[3] Furthermore, discrimination on the basis of citizenship also violates the United States Government's legal obligations under international human rights law. The *International Covenant on Civil and Political Rights* (ICCPR) sets out in article 14(1) that all persons "shall be equal before the courts and tribunals."[4]

Thus, the PMO is unconstitutional and invalid. Accordingly, this military commission lacks jurisdiction to try Mr. Hicks on any charge, and the charges against Mr. Hicks must be dismissed.

B. The Order Violates the Fifth Amendment's Equal Protection Guarantee

The PMO applies only to individuals who are not United States citizens.[5] There is no precedent for our Government to authorize the trial of non-citizens before a military tribunal while expressly exempting U.S. citizens alleged to have committed the very same acts. All prior United States' military commissions applied to both citizens and non-citizens alike.[6] For example, President Roosevelt's 1942 proclamation establishing the jurisdiction of military commissions over seven individuals who entered the United States with the intent to commit acts of sabotage had express provisions ensuring that United States citizens could be tried by military commission.[7] Such evenhanded treatment of all "persons," whether citizens or non-citizens, is required when the government seeks to use military commissions to try and punish persons for violations of the law of war or other offenses.[8]

The PMO violates this precedent by granting the protections of the federal courts to United States citizens but denying those protections to non-citizens like Mr. Hicks.

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[3] *See* Jean S. Pictet (ed), *Commentary — III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), p. 623.

[4] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by the United States on 8 June 1992. Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

[5] Section 2(a) of the PMO states [t]he term "individual subject to this order" shall mean any individual who is not a United States citizen . . . ." Section 4.(a) of the PMO states [a]ny individual subject to the order shall, when tried, be tried by military commission . . . ."

[6] It is generally agreed that the United States began using military commissions in 1847 during the Mexican-American War. David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2027. Unlike the Order in this case, however, the Order used in the Mexican-American War subjected both citizens and non-citizens to military tribunals. *See* General Orders, No. 287, at ¶ 9 (Sept. 17, 1847); Louis Fisher, Congressional Research Service, *Military Tribunals: Historical Patterns and Lessons,* 12 (quoting memoir stating that "all offenders, Americans and Mexicans, were alike punished" under Order); *see also* Glazier, 89 Va. L. Rev. at 2030. The application of military commission jurisdiction to citizens and non-citizens alike continued through World War II, the last time our government tried individuals before military commissions. *See Ex Parte Quirin*, 317 U.S. 1 (1942).

[7] *Id.* at 22.

[8] *See id.* at 37.

Thus, the PMO departs from constitutional and international dictates, as well the fundamental traditions of fairness, that underlie and enforce the guarantee of equal protection.

C. Government May Not Discriminate Against Non-citizens in Criminal Prosecutions

The federal government has clear authority to differentiate between citizens and non-citizens in the areas of foreign affairs and immigration. Non-citizens may be deported or even detained for extended periods of time for reasons associated with their immigration status. However, this authority to differentiate between citizens and non-citizens does not extend to situations in which the government seeks to punish non-citizens.[9]

As far back as 1896, the Supreme Court held that the government must use the same processes for non-citizens as it does for citizens when trying non-citizens for criminal misconduct. In *Wong Wing v. United States*,[10] the Supreme Court declared that if the government "sees fit to . . . subject[] the persons of such alienage to infamous punishment," discrimination is constitutionally intolerable: "even aliens shall not be held to answer for a capital or other infamous crime" without affording them the same protections with which the Fifth Amendment cloaks citizens.[11]

Since *Wong Wing*, the Supreme Court has repeatedly reaffirmed the principle that while the federal government may discriminate against non-citizens with respect to immigration and foreign affairs, it may not use different procedures and processes to try and/or punish non-citizens.[12] The Court's declaration that it will not "bolt the door to

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[9] *See e.g. Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection").

[10] 163 U.S. 228, 237 (1896).

[11] *Id.* at 237-38.

[12] *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of "punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotation and citation omitted). *See also Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime"); *Rodriguez-Silva v. INS*, 242 F.3d 243 (5th Cir. 2001) (noting that although the federal government has wide latitude to set "criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States," it is settled that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States.") (citing *Wong*).

equal justice," applies with equal force here to Mr. Hicks since the most fundamental right of all – the essential right of liberty from confinement – is at stake.[13]

Since the Equal Protection clause requires that distinctions be rational, the Court has condemned systems in which unreasoned distinctions, such as citizen versus non-citizen, are used to impede open and equal access to the courts.[14] While the government may impose special burdens upon defined classes in order to achieve permissible ends, the Equal Protection Clause requires that the distinctions that are drawn have "some relevance to the purpose for which the classification is made."[15] Here, in contrast, there is no legitimate reason for subjecting Mr. Hicks to trial before a military commission while making a similarly situated U.S. citizen ineligible therefore.

A comparison of Mr. Lindh's situation and circumstances with those of Mr. Hicks vividly illustrates the point. Just like Mr. Hicks, Mr. Lindh was seized in Afghanistan, allegedly in the course armed conflict on the side of the Taliban.[16] Yet unlike Mr. Hicks, Mr. Lindh, solely because of his U.S. citizenship, was *not* transferred to Guantanamo Bay to await trial by military commission, but was instead charged in federal court with conduct mirroring that alleged against Mr. Hicks: someone who joined a conspiracy to undertake violent acts against U.S. citizens, property, and interest, and who pursued those objectives by engaging U.S. forces in armed hostilities in Afghanistan.[17]

Indeed, Mr. Hicks' charge sheet specifically alleges that he traveled to Konduz, Afghanistan in November 2001, where "he joined others, including John Walker Lindh, who were engaged in combat against Coalition forces."[18]

Thus, there is no substantive distinction between the conduct alleged against Mr. Hicks and that alleged against Mr. Lindh. Yet they have received vastly different treatment, both in terms of their detention, as well as in the systems in which the government seeks to adjudicate their cases, based on a wholly invalid criterion: Mr. Lindh's U.S. citizenship, and Mr. Hicks's lack thereof.

That distinction is based exclusively on the PMO. Thus, the PMO violates the Equal Protection Clause of the U.S. Constitution, as well as the provisions of 42 U.S.C. §1981, and is invalid. Accordingly, this commission is without jurisdiction to try Mr. Hicks, and all charges against him should be dismissed.

D. The Government Has Discriminated Among Citizens of Different Foreign Countries

The Government has also violated the Equal Protection Clause by treating similarly situated non-citizens held at Guantanamo Bay Naval Base differently.

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[13] *See Griffin v. Illinois*, 351 U.S. 12 at 24 (1956).

[14] *See e.g. Rinaldi v. Yeager*, 384 U.S. 305 at 310 (1966).

[15] *See id.* at 308.

[16] *See United States v. Lindh*, 212 F. Supp. 2d 541, 568 (E.D. Va 2002).

[17] *Id.*

[18] *Id.*

Specifically, the Government has released hundreds of detainees to their home countries without subjecting them to any process or tribunal, while it has charged Mr. Hicks and designated him for prosecution.

Mr. Hicks is being held at Guantanamo Bay Naval Base pursuant to an Executive (*i.e.*, Department of Defense) finding that there was "no doubt" that he and the other Guantanamo detainees were "enemy combatants" and thus did not merit any process to determine their status. Notwithstanding that conclusory finding, Mr. Hicks has never been granted any process that would put the government's assertion to the test, or provide him any opportunity to contest it. Indeed, the Government has detained more than 600 persons at Guantanamo Bay Naval Base for more than two years without affording the detainees any such process.[19]

In addition, the Government has released and repatriated many detainees to their own countries (as listed **ante**).[20] Those detainees who have been released were detained for the same or substantially similar reasons as Mr. Hicks (and for roughly the same period of time). Yet Mr. Hicks has been, in effect, singled out for continued detention, prosecution, and, ultimately, potential punishment. The Government has not and will not disclose its reasons for releasing certain detainees, but for many the only apparent reason is their citizenship — *i.e.*, British citizens who were detained were not subjected to military commissions and were instead released solely because of the intercession of their government (and the same is almost certainly true with respect to the other persons released)..

For the reasons stated above, the Government, when it seeks to impose punishment, may not discriminate between individuals based on citizenship. Here the government is doing just that. Since the government here, in its prosecution of Mr. Hicks, has violated the Equal Protection Clause of the Constitution, the terms of 42 U.S.C. §1981, and the international standards and principles requiring equal protection, the charges against him must be dismissed in their entirety.

E. The Equal Protection Clause Applies in this Case

Certainly, Equal Protection, in all its forms, and from all of its sources, applies to Mr. Hicks in this case. Recently, in *Rasul v. Bush*,[21] a case in which Mr. Hicks has been a named plaintiff since its inception, the Supreme Court held that 28 U.S.C. §2241, which

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[19] In response to recent Supreme Court rulings, the government has fashioned the Combatant Status Review Tribunal (hereinafter "CSRT"), which is designed to determine whether Guantanamo detainees are "enemy combatants." While the CSRT framework falls well short of affording due process, and/or satisfying the standards of the Geneva Convention and/or the U.S. military regulations implementing the Convention, at least one of the detainees was found by the CSRT not to be an enemy combatant, despite the government's finding almost three years ago that there was "no doubt" as to the detainees all being "enemy combatants."

[20] A Department of Defense news release dated 18 September 2004 disclosed that as of that date 191 detainees had been released from Guantanamo including, at least 34 Pakistanis, 5 Moroccans, 4 French, 7 Russians, 4 Saudis, 1 Spanish, 1 Swede, 5 Britons, and numerous citizens of other nations.

[21] ___ U.S. ____, (2004)

authorizes U.S. District Courts to hear *habeus corpus* petitions, was available to Mr. Hicks and the other Guantanamo detainees, despite their never having been phsycially within the territory of the United States.[22] In so ruling, the Supreme Court rejected the Government's argument that statute was inapplicable outside the territorial jurisdiction of the United States.

The Court reasoned that because the detainees, including Mr. Hicks, were held in United States's custody at Guantanamo Bay Naval Base, an area over which the United States exercises "complete jurisdiction and control," they could invoke the federal courts' authority under §2241.[23] Further, the Court opined that the detainees could bring other non-*habeas* claims in federal court despite their military detention outside United States territory.[24] Moreover, the Court affirmed the detainees' physical confinement at Guantanamo Bay Naval Base did not affect their ability to pursue in the federal courts their claims that implicate the "same category of laws listed in the *habeas corpus* statute."[25]

As the Court pointed out in *Rasul*, §2241 extends the writ to prisoners held in "violation of the Constitution, or laws or treaties of the United States."[26] The Equal Protection Clause is a part of the Constitution of the United States. The ICCPR is a treaty of the United States.

In addition, even if the commission were to find that the Equal Protection Clause did not apply to detainees held at Guantanamo Bay Naval Base, the similar provision of the ICCPR which requires that persons be treated equally before the courts and tribunals would apply there, as the ICCPR applies to all individuals subject to a State Party's jurisdiction.[27] This includes Guantanamo Bay Naval Base. Thus, the applicability of Equal Protection to Mr. Hicks – under any of these alternative bases – cannot be disputed.

F: Conclusion

The PMO and subsequent Executive action (the release of other non-citizens from detention at Guantanamo) has discriminated against Mr. Hicks on the basis of his citizenship. Thus, the PMO establishing military commissions violates the Equal Protection Clause of the United States' Constitution and the United States' legal obligations under the law of war and human rights law, and is invalid.

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[22] *Id.*

[23] *Id.*

[24] *Id* at 124 S.Ct. at 2699.

[25] *Id.*

[26] 28 U.S.C. §2241.

[27] ICCPR, art 2. See also the International Criminal Court's Advisory Opinion: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. Available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Evidence:**

A: The defense reserves the right to call witnesses after reviewing the Government response to this motion.

B: Attachments

1. *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, art 49.
2. Jean S. Pictet (ed), *Commentary — III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), p. 623.
3. *International Covenant on Civil and Political Rights*, Articles 2 and 14(1).
4. David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, pages 2027 and 2030.
5. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ.

6. **Relief Requested:** The Defense requests that all charges be dismissed.

7. The defense requests oral argument on this motion.

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Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Attachment 1 to RE ____

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Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following, of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

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THE GENEVA CONVENTIONS
OF 12 AUGUST 1949

COMMENTARY

III
GENEVA CONVENTION

RELATIVE TO THE TREATMENT
OF PRISONERS OF WAR

Attachment 2 to RE ____

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INTERNATIONAL COMMITTEE OF THE RED CROSS

in fact possible to him " (Report of the International Law Commission covering its Third Session). Later, on the basis of comments by Governments, the Commission changed this wording to provide that the accused would be responsible under international law only if, in the circumstances, it was possible for him to act contrary to superior orders.

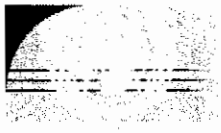
PARAGRAPH 2. — SEARCH FOR AND PROSECUTION OF PERSONS WHO HAVE COMMITTED GRAVE BREACHES

The obligation on each State to enact the legislation necessary implies that such legislation should extend to any person who has committed a grave breach, whether a national of that State or an enemy.

The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all despatch. The necessary police action should be taken spontaneously, therefore, and not merely in pursuance of a request from another State. The court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.

Extradition is restricted by the domestic law of the country which detains the accused person. Indeed, a rider is deliberately added: " in accordance with the provisions of its own legislation ". Moreover, a special condition is attached to extradition: the Contracting Party which requests the handing over of an accused person must make out a *prima facie* case against him. There is a similar clause in most of the national laws and international treaties concerning extradition. The exact interpretation of " *prima facie* case " will in general depend on national law but it may be stated as a general principle that it implies a case which in the country requested to extradite would involve prosecution before the courts.

Most national laws and international treaties on the subject preclude the extradition of accused who are nationals of the State detaining them. In such cases, Article 129 quite clearly implies that the State detaining the accused person must bring him before its own courts.



Office of the High Commissioner for Human Rights

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

Attachment 3 to RE ____

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Article 2 ***General comment on its implementation***

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

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Article 14 ***General comment on its implementation***

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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*89 Va. L. Rev. 2005, **

Virginia Law Review

December, 2003

89 Va. L. Rev. 2005

LENGTH: 37641 words

NOTE: **KANGAROO COURT** OR COMPETENT TRIBUNAL?: JUDGING THE 21ST CENTURY MILITARY COMMISSION

NAME: David Glazier*

Attachment 4 to RE ____

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A. The Mexican War: Origin of the Military Commission

Many commentators contend that the United States first used military tribunals to try spies during the Revolution. [80] A key difference between those trials and later use of military commissions, however, was a specific statutory grant of court-martial jurisdiction over spies enacted by Congress in 1776. [81] The early spy trials thus do not share the "common law" basis of later tribunals that were used to extend jurisdiction to persons not otherwise subject to American military justice. The conclusion that military jurisdiction was strictly limited to persons subjected to military authority by Congress was specifically endorsed by the early commentators on American military justice. Major Alexander Macomb, who published the first U.S. military justice treatise in 1809, wrote that military jurisdiction extended only over those persons Congress specifically included in the Articles of War. [82] The same conclusion was reached in a more comprehensive treatise published by Captain William C. De Hart in 1846. Captain De Hart noted that in the United States, only Congress by ""positive provision to that effect'" can make an individual subject to military jurisdiction. [83]

It is generally agreed that the real origin of the military commission dates from the Mexican War of 1846-1848. [84] Modern scholars, however, virtually all overlook one very important fact: These trials were first established to permit prosecution of American soldiers, not Mexicans. This distinction is significant because it strongly suggests there was good reason for the military commission to provide the same standards of due process as the court-martial did right from its beginnings.

The Articles of War that were in effect in that era included no authority to punish servicemembers for offenses against civilians. When a U.S. soldier murdered a Mexican early in the conflict, the **[*2028]** Secretary of War concluded that the only available remedy was to discharge the killer and send him home. [85] Discontented with that result, General Winfield Scott, the U.S. Army commander, resolved to correct this injustice by imposing martial law in Mexico and convening "military commissions" (a term he coined) to try U.S. soldiers for civil offenses not covered by the Articles of War, such as murder, rape, and robbery. [86] He implemented this policy through general orders that were promulgated in captured Mexican territory. These orders set forth the shortcomings in existing U.S. law, enumerated the offenses to be punished, and defined the commissions to be used, specifically stating that they were to be based on the court-martial procedures of the Articles of War. [87] In his memoirs, General Scott colorfully described the reception his martial law plan received from his civilian superiors prior to his departure for Mexico:

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Given General Scott's purpose, it should come as no surprise that his military commission followed the pattern of the court- **[*2030]** martial in procedure, rights granted the accused, rules of evidence, and post-trial review. [94] First, of course, the rules of court-martial practice were the ones familiar to the American officers who composed these courts. But even more importantly, as the analysis that follows will show, a majority of the persons tried by the military commissions in Mexico were American citizens. For an American-trained lawyer like General Scott, due process considerations would have demanded no less.

This correlation between the court-martial and the military commission is borne out by analysis of general orders issued by Army commanders in Mexico during the war. Both courts-martial and military commissions were convened by essentially identical general orders that specified the time and place of convening, the composition of the trial panel, and the prosecuting judge advocate. [95] In this era, the Articles of War permitted a general court-martial to consist of between five and thirteen officers, but required the full thirteen when "that number [could] be convened without manifest injury to the service." [96] In Mexico, this seems to rarely have been practicable without inflicting such injury upon the Army, and most court-martial convening orders reviewed by the author show smaller numbers. [97] The orders stressed that the court-martial could continue to meet only if the membership remained "not less than the minimum [five] prescribed by law." [98] This same practice was observed for military commissions, including the phraseology about the "minimum prescribed by law," [99] even though at **[*2031]** this point in history the military commission had not been accorded any formal legal recognition.

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INTERNATIONAL COURT OF JUSTICE

YEAR 2004

9 July 2004

2004
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General List
No. 131

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

Attachment 5 to RE ____

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108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, Chap. V, para. 4 (1955)).

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110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question "whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction" for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that "the Covenant and similar instruments did not apply directly to the current situation in the occupied territories" (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed "to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .", the Committee reached the following conclusion:

> "in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

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